COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Bay State Gas Company	)	**D.T.E. 05-27**

APPEAL BY THE ATTORNEY GENERAL OF THE HEARING OFFICER'S AUGUST 11, 2005 RULING PERTAINING TO INCLUSION OF BAY STATE GAS COMPANY'S 2005 STEEL INFRASTRUCTURE REPLACEMENTS AS POST TEST YEAR CAPITAL ADDITIONS TO RATE BASE

The Attorney General, pursuant to 220 C.M.R. § 106(6)(d)(3) and G. L. c. 30A, § 11, appeals to the full Commission of the Department of Telecommunications and Energy ("DTE" or "Department") the Hearing Officer ruling of August 11, 2005 ("Ruling") regarding the Attorney General's objection to inclusion of Bay State Gas Company's ("Bay State" or "Company") 2005 steel infrastructure replacement ("SIR") invoices as post-test year capital additions to the Company's rate base in the present rate case docket. The Ruling, reflected in pages 4036 - 4039 of the August 11, 2005 transcript, Vol. 25 (Exhibit "A"), also denied the Attorney General's requests for a reasonable extension of time in the briefing schedule to review the 2005 SIR invoices, conduct supplemental discovery on the Company's 2005 SIR invoices, offer rebuttal witnesses, and file supplemental briefs regarding the 2005 SIR invoices. Those requests are reflected in the Attorney General's Objection filed August 11, 2005 ("Exhibit B") and Exhibit A, pp. 4028 - 4035, [1]

[1] Should the Company offer to extend the Attorney General's initial briefing deadline by a short time, say, two days, such an extension would be inadequate to conduct a meaningful review of the SIR 2005 documents. Although the Attorney General has assigned four attorneys to this large rate case, those attorneys are working on various portions of the initial brief (due August 31) and cannot spare time now to review the six boxes of documents containing roughly 4,000 pages in RR-DTE-160 and 161. Consequently, the Attorney General has recommended an alternate supplemental discovery/hearings/briefing schedule.

The Company produced the 2005 SIR invoices and calculations (RR-DTE-160 and RR-DTE-161) on August 19 and 22, 2005, nearly four months after the Company filed its rate case, which prevented the Attorney General from receiving sufficient advance notice of the inclusion of post-test year plant additions to conduct cross-examination, offer rebuttal witnesses, and brief the issues during the established procedural schedule. The Ruling denied the Attorney General a realistic procedural schedule for meaningful review and comment on the prudence of the SIR 2005 construction.

I. Background

On August 9, 2005, the Department issued two record requests to the Company during hearings, RR-DTE-160 and RR-DTE-161, as shown on pages 3856 to 3873, Vol. 23 ("Exhibit C") and asked the Company to submit its 2005 invoices arising from the Company's 2005 Steel Infrastructure Replacement ("SIR") construction program. As shown in the Attorney General's August 11, 2005 Objection ("Exhibit B") and during hearings on the matter, the Attorney General challenged the inclusion of these invoices into the record at this late date of the proceedings because the Hearing Officer's review schedule did not allow any time for meaningful prudence of the invoices as post-test year additions to plant in service.[2] The Hearing Officer overruled the Attorney General's Objection and denied his requests for extensions of the briefing period, discovery period, and presentation of rebuttal witnesses. Exhibit A, p. 4038.

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[2] The Hearing Officer, on August 9, set a procedural schedule which required the Company to produce its 2005 SIR invoices by August 16, and permitted the Attorney General to cross-examine the Company's witness, Mr. Danny Cote, on August 22 for three hours. Exh. C, pp. 3868, 3873. The Hearing Officer subsequently amended the schedule, and the timing of this appeal, because the Company informed the Department and parties that it would not be able to produce the voluminous documents until August 19.

II. Standard of Review

The Department's procedural rules provide the presiding officer with the discretion to make all decisions regarding the admission or exclusion of evidence or any other procedural matters that may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a); *see also Western Massachusetts Electric Company*, D.T.E. 97-120-3, p. 6 (1998). Additionally, the Department's procedural rules provide that to the extent that it is deemed necessary and practical, the presiding officer shall establish a fair and detailed schedule for the proceeding, including, but not limited to, discovery, evidentiary hearings, and briefs. 220 C.M.R. §1.06(6)(b); *see also Western Massachusetts Electric Company,* D.T.E. 97-120-3, at 6. A procedural schedule is within the discretion of a presiding officer, but that discretion is not unlimited and where a presiding officer abuses his or her discretion, the Department may overturn a ruling or decision of the presiding officer. See *Western Massachusetts Electric Company*, D.T.E. 97-120-3, pp. 1-12 (1998); *New England Telephone*, D.P.U. 90-206/91-66, pp. 9-11 (1991).

Every agency decision must be in writing or stated in the record, and all evidence upon which the Department relies for its conclusions must be offered and filed as part of the record. G.L. c. 30A, § 11(4). The decision must be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision. G.L. c. 30A, § 11(8); *Massachusetts Institute of Technology v. Department of Public Utilities & another*, 425 Mass. 856, 868 (1997).

The standard of review for non-revenue producing projects is the same as the standard for revenue-producing projects. Both categories of expenditures must be prudently incurred and the resulting plant must be used and useful to ratepayers. *KeySpan*, D.T.E. 03-40, at 67 (2003);

D.P.U. 85-270, at 20. Non-revenue projects cannot be aggregated as part of a prudence review because to do so will frustrate the ability of management in its ability to identify and control costs. *KeySpan*, D.T.E. 03-40, at 69 (2003).

Post-test year additions will be recognized in rate base only when they have been shown to be in service and have significantly increased the rate base. D.P.U. 1300, p. 18 (1983). A three percent increase in the rate base is insufficient to constitute a "significant increase" in the Company's rate base or as a sizeable capital investment. *Fitchburg*, D.P.U. 1214, pp. 4-5 (1983).

III. ARGUMENT

A. The Ruling Denies The Attorney General Adequate Notice and Opportunity to Review, Comment, and Investigate the Company's 2005 SIR invoices.

The Ruling, the underlying Department requests for documents, the Company's production of the 2005 SIR invoices, and the Hearing Officer's procedural schedule for review of the 2005 SIR documents combine to constitute an abuse of discretion prohibited by G.L. c. 30A, §§ 11(1) and (3), because the production and abbreviated review schedule of those documents deprive the Attorney General of adequate time to review and investigate the documents and impairs his ability to adequately address the rate case issues.

The State Administrative Procedure Act, G.L. c. 30A, affords parties to adjudicatory proceedings before administrative agencies "reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). The Ruling does not provide sufficient opportunity and time within which to examine the thousands of pages of invoices and calculations that have, indeed, been submitted to the Department and Attorney General for review. The Ruling denied the Attorney General's requests for an extension of the briefing

period to permit time to review the 2005 SIR documents, denied any meaningful opportunity for discovery, cross-examination, presentation of rebuttal witnesses, or reasonable briefing opportunity on these 4000+ pages of documents.

The Department should overturn the Ruling and either bifurcate its consideration of the SIR 2005 plant additions into a second phase of the case or, at a minimum, adopt the following review schedule for the RR-DTE-160 and 161 responses: (1) permit the parties to issue supplemental discovery to the Company on the responses until October 4, 2005; (2) schedule supplemental hearings (direct and rebuttal) for October 18-19, 2005;[3] and (3) permit simultaneous supplemental briefs to be filed on November 3, 2005. This supplemental schedule would allow all parties to satisfy their existing briefing obligations while providing for the necessary supplemental discovery, hearings, and briefing to adequately review the 2005 SIR documents.

IV. CONCLUSION

The Hearing Officer's August 11, 2005 Ruling does not afford the Attorney General a reasonable opportunity to address the issues raised at the hearing or to adequately address the

[3] Both Mr. Skirtich and Mr. Cote should be made available for hearings since they co-sponsored the Company's responses to RR-DTE-160 and 161. Some of the proceeding may need to be placed on a sealed record due to the Company's motion for confidential treatment of its responses.

public interest for the Department. The Hearing Officer's Ruling, therefore, constitutes an abuse of discretion, and the Commission should overturn the Ruling and provide the Attorney General with more time as outlined above.

Respectfully submitted,

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